United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1938

To be argued by
STEVEN A. SCHATTEN

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 74-1938

UNITED STATES OF AMERICA,

Appellee,

—v.—

MORRIS HALL,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Morris Hall appeals from a judgment of conviction entered on February 21, 1974 after a five-day trial before the Honorable Charles E. Stewart, Jr., United States District Judge, and a jury.

Indictment 73 Cr. 802, filed on August 17, 1973, charged Hall in one count with the robbery of the Security National Bank, 1121 Madison Avenue (at 84th Street), in Manhattan on January 25, 1973, in violation of Title 18, United States Code, Section 2113(a).

A pre-trial suppression hearing was held on January 25, and 28, 1974 (and was continued and concluded prior to opening statements on February 14, 1974). Trial commenced on February 13, 1974 and ended with a guilty verdict on February 21, 1974. On March 18, 1974, Judge Stewart sentenced the defendant to the custody of the

Attorney General for study, report and recommendation pursuant to Title 18, United States Code, Section 4208(b) and (c). On July 3, 1974, having received the report, Judge Stewart sentenced the defendant to 15 years imprisonment to be followed by a term of community supervision.

Hall is presently serving his sentence.

Statement of Facts

Government's Case

Through the testimony of four employees of the Security National Bank (the "Bank"), three of whom were present during the robbery, and FBI Special Agents Milton Ahlerich and James Murphy, the agent who took Hall's post-arrest statement, the Government established that on the morning of January 25, 1973 (Tr. 192) a man came into the Bank, approached Mrs. Flora O'Rourke, the head teller, and asked her if he could cash a check.* Mrs. O'Rourke asked the man if he had an account at the Bank, and he said no. Mrs. O'Rourke told the man to go to the Bank's platform, but the man refused.**

The man gave Mrs. O'Rourke a brown paper bag which he told Mrs. O'Rourke to fill. Mrs. O'Rourke pulled the alarm and started to fill up the bag. The man pulled out a gun and told Mrs. O'Rourke to hurry up because he was not fooling (Tr. 192).

In all, Mrs. O'Rourke put in $27,078 into the brown paper bag, including $500 in decoy or bait money (Tr. 103, 193).

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* Mrs. Ouida Morrison, another bank teller, testified that she had first observed the robber for about five minutes while he was walking back and forth outside the Bank (Tr. 156).

** Eyewitness identification testimony implicating Hall was furnished by Mrs. Morrison and Mrs. O'Rourke.

Charles Sullivan, a bank guard, approached the bank robber to find out what the trouble was. The bank robber grabbed Sullivan, pushed him up against the counter, put a gun into Sullivan's ribs and took Sullivan's gun, GX 10, (a Smith & Wesson 38 cal. revolver, serial number D184306) (Tr. 200-203, 294).

The bank robber put a gun into the paper bag, into which Mrs. O'Rourke had placed the Bank's money (Tr. 201).

A short time after the bank robber had left the Bank, four men entered the Bank, with a brown paper bag containing some money, including $480 of the decoy money (Tr. 104-09, 193-94, 203-04, 223-224). The brown paper bag was placed on the head teller's counter.

FBI Agent Milton Ahlerich took the brown paper bag which had a tear in it from the head teller's counter (Tr. 209-211, 215). On the counter, was a large amount of currency, some with straps on, some off. Ahlerich also seized the straps (Tr. 215, 224). The brown paper bag contained two of Hall's fingerprints (Tr. 241).

On April 13, 1974, at about 12:50 P.M., Hall was arrested in a Harlem luncheonette on West 125th Street by Detective Maurice Vosges, Detective D'Alba and Patrolman Steffen for menacing one Arthur Dancy with a revolver (GX 3510C, GX 20; Tr. 369). The revolver belonging to Charles Sullivan, the bankguard, was found on Hall (GX 10; Tr. 280). After being advised of his *Miranda* rights, Hall falsely stated that he had bought the gun in the street for $50.

On May 31, 1974, while Hall was in custody at Riker's Island on a New York State charge, he was visited by FBI agents. After receiving his *Miranda* warnings, Hall gave a statement to FBI Agents James Murphy and Thomas Cotton detailing his involvement in the robbery of

the Bank. Hall told the FBI Agents that while walking on 84th Street approaching Madison Avenue, he decided to rob the Bank. He said that he had obtained the brown paper bag at a nearby store and that he entered the Bank armed with a .32 or .38 caliber revolver. He also described the details of the robbery inside the Bank. Hall further disclosed that as he was running on 84th Street after fleeing the Bank, the brown paper bag broke and the two guns and the money fell to the ground. An individual came over to help Hall pick up the money until that man saw the two guns lying on the ground. Then Hall picked up some of the money and the guns and fled. He left the torn brown paper bag and the rest of the money on the ground (Tr. 368-370).

Hall went on to say that on April 13, 1973, he was arrested by the New York City police for possessing a loaded gun, and that this gun was the one that he had taken from the bank guard during the robbery (Tr. 369).*

Defense Case

The defendant did not take the stand.

The defendant called Eugene Coyle, supervisor of protection services in the security department of the Security National Bank, who testified that the bank surveillance camera at the Madison Avenue and 84th Street Branch had not activated because the switch was not in the proper position (Tr. 398). Moreover, when the film was removed from the camera, it failed to disclose any photographs (Tr. 398-400).

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* Contrary to Hall's brief, most of the details which are contained in the statement to the FBI Agents—which Hall had read and which Hall had stated was correct—were supplied by Hall, as FBI Agent Murphy's redirect examination reveals (Tr. 370-375).

The defense introduced a Clinical Summary concerning Hall from Matteawan State Hospital dated February 8, 1972 (DX F).* At the time of the offer, Hall's counsel stated:

> "I am not offering it as to his competence to stand trial" (Tr. 393).

This was fully consistent with the position that Hall had previously taken in a letter, dated February 1, 1974, to the District Court, wherein his counsel had stated:

> "I absolutely do not intend to raise any claim that Mr. Hall is not competent to stand trial."

Hall also introduced a letter from the Superintendent of the Clinton Correctional Facility, Dannemora, New York, on State of New York, Department of Correctional Service, stationery, to defense counsel, stating that Hall had been received at Clinton from Greenhaven Correctional Facility on February 11, 1972 and had been discharged by maximum expiration of sentence on November 8, 1972 (Tr. 405; DX H).

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* The Government, in its rebuttal case, introduced a stipulation to the effect, that the FBI Agents would have followed precisely the same procedure in advising Hall of his rights and taking the statements had they known that Hall had been confined to a mental institution, as set forth in DX F.

ARGUMENT

POINT I

The Trial Court properly admitted the bank guard's revolver seized from Hall in connection with a state arrest.

Hall moved before trial to suppress the bank guard's revolver, which had been seized from him at the time of his arrest by New York City police officers on April 13, 1973. After an evidentiary hearing, Judge Stewart denied the motion. Memorandum Opinion, filed March 1, 1974, pp. 6-11 (hereinafter "Opinion"). Prior to the evidentiary hearing, Hall had unsuccessfully sought to suppress the revolver from being offered at his state court trial. State Court Suppression Hearing Tr. 16-17 (hereinafter "St. Ct. H.").

At the pre-trial suppression hearing on January 25, 1974, Detective Maurice Vosges of the New York City Police testified* that at about 12:50 P.M. on April 13, 1973, he and fellow police officers had been inside a Harlem luncheonette at 261 West 125th Street, when a man named Arthur Dancy advised him that defendant Hall had a gun and that he was bothering Dancy (H. 65-66). Detective Vosges approached Hall and asked him for his identification and whether he had a gun. Hall did not reply (H. 66).

Detective Vosges noticed a bulge in the front of Hall's coat, whereupon Vosges and another detective grabbed Hall. Thereupon, Vosges felt the bulge, opened Hall's coat,

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* Hall also testified (H. 208-228), at the suppression hearing, but the Court rejected his testimony where it was inconsistent with the testimony of Detective Vosges.

and withdrew the gun Hall was carrying. This was the gun taken from the bank guard Charles Sullivan on the day of the bank robbery (GX 10).

In holding the revolver admissible, the District Court ruled that the police:

> "conducted the type of limited search for weapons approved by the Supreme Court in situations where the police have reason to fear for their safety. *Adams* v. *Williams,* 407 U.S. 143 (1971); *Terry* v. *Ohio,* 392 U.S. 1 (1968)." Opinion, p. 8.

The District Court explained:

> "In this case, we find the officers' response to the situation to have been reasonable. Upon advice from a complaining witness that the defendant was armed and 'bothering' him, the officers approached the defendant. Under the circumstances, the defendant's failure to respond to their initial questions concerning his identity and possession of a gun, may reasonably have been viewed as suspicious conduct, tending to corroborate the complaining witness. We find that these facts fall within the 'lenient' test in *Adams* for an investigatory stop and frisk for weapons. *United States* v. *Santana,* 485 F.2d 365 (2d Cir. 1973). Once this intermediate response uncovered the weapon, the police had probable cause to arrest the defendant, and seize the gun." Opinion, p. 9.*

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* The State Court had previously denied defendant's motion for similar reasons pointing out that the police officers:

> "would have been derelict in their duties had they not stopped and inquired of the defendant and searched him [Hall] in a frisk manner in order to determine whether or not he had or had not such a weapon." St. Ct. H. 17.

[Footnote continued on following page]

Hall completely fails in his attempt to distinguish *Adams* v. *Williams*, 407 U.S. 143 (1973). Moreover, he does not even mention the two other cases relied on by the District Court, *Terry* v. *Ohio*, 392 U.S. 1 (1968) and *United States* v. *Santana*, 485 F.2d 365 (2d Cir. 1973), which are squarely applicable here.

In *Adams* v. *Williams*, 407 U.S. 143 (1972), *Terry* v. *Ohio*, 392 U.S. 1 (1968) and *Sibron* v. *New York*, 392 U.S. 40 (1968), the Supreme Court approved protective frisks for weapons conducted in the absence of probable cause. See also *United States* v. *Robinson*, 414 U.S. 218, 227-229 (1973); *United States* v. *Santana*, *supra*, 485 F.2d at 368; *United States* v. *Vigo*, 487 F.2d 295, 298 (2d Cir. 1973).

By any relevant standard, the stop and frisk of Hall by Officer Vosges and his colleagues after they received information from Dancy that Hall had a gun and had been bothering him was reasonable, appropriate and lawful. Certainly, the risk of harm to Detective Vosges and his colleagues—and, of course, to Dancy—was at least as great as in *Adams* and far greater than in *Santana*.

Dancy at the time was in the same luncheonette. He identified Hall as the man who had the gun and who was after him. If Dancy's information was true—and the police officers had no reason to believe otherwise—they were investigating an individual at close range who was armed and was then dangerous to Dancy, as well as to

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In view of its holding, the District Court (Opinion, p. 9, n. 10) found it unnecessary to pass on the Government's contention that principles of collateral estoppel precluded defendant from relitigating the precise issue that had previously been resolved against him in the State Court. *See United States* v. *Kramer*, 289 F.2d 909, 913 (2d Cir. 1961) (Friendly, *J.*); *cf. Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1917).

themselves. This was sufficient to authorize Vosges and his colleagues "to conduct a limited protective search for concealed weapons." *Adams* v. *Williams, supra,* 407 U.S. at 146.

These facts, followed by Hall's refusal to respond to questions, were more than sufficient to constitute proper grounds for the frisk. *Adams* v. *Williams,* 407 U.S. at 145-147 (where verbal statements coupled with rolling down a car window, rather than opening the car door, were held to authorize a policeman to reach into defendant's waistband and remove a gun). Here, of course, there was testimony as well that Vosges had observed a bulge in Hall's jacket. As *Adams* recognized:

> "the Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response." 407 U.S. at 145.

When the frisk revealed the concealed weapon, the officers unquestionably had probable cause to arrest Hall for violation Section 265.05 of the New York Penal Law. Indeed, Hall's possession of the gun corroborated Dancy's identification of him as the man who had the gun and coupled with Dancy's other information, furnished probable cause to support the additional charge of menacing under Section 120.05 of the New York Penal Law. *Draper* v. *United States,* 358 U.S. 307, 309-310 (1959).

In sum, the District Court's denial of Hall's motion to suppress the bank guard's gun was clearly correct.

POINT II

The Trial Court properly admitted Hall's statement to the New York City Police, made after Hall had been afforded all of his rights under *Miranda* v. *Arizona*.

Hall claims that the District Court improperly admitted into evidence his false exculpatory statement, given to the New York City Police after he had received his *Miranda* warnings, that he had bought the bank guard's gun (GX 10) on the street for $50.00.

Hall's position—that he had never been warned of the fact that anything he said could be used against him—proceeds on an erroneous reading of the transcript of the hearing and omits any mention of the District Court's findings that:

> "He was brought to the police station where Officer Steffen, one of the policemen present at the arrest, advised him of his constitutional rights by reading to him from a form. The defendant was advised of his right to be or remain silent at any time, his right to have an attorney present during questioning, and his right to have an attorney provided for him if he could not afford one. *He was also advised that anything he said could be used against him in court.*
>
> The defendant stated that he understood the rights of which he had been advised. Thereafter, Officer Steffen asked the defendant where he had gotten the gun, to which he responded, 'I bought the gun for fifty dollars in the street.'" Opinion, pp. 7-8 (emphasis added).

At the preliminary hearing, Detective Vosges testified that Hall had been afforded his *Miranda rights* (H. 68),

when Police Officer Bernard Steffen read these rights from a form. (H. 99). These warnings, including the statement that "Anything you say can be used against you in court," were given to Hall. (H. 68, 99-100).

Contrary to Hall's distorted version of the facts and testimony, it is clear that prior to Hall's false exculpatory statement, Patrolman Steffen, in the presence of Detective Vosges, read from a card all of the *Miranda* rights to which Hall was entitled (H. 68, 99-100).

The District Court, in ruling on the admissibility of the statement so found and its ruling was fully supported by the record.*

POINT III

Defendant's statement to the FBI agents, made after he had received his *Miranda* warnings, was properly admitted into evidence.

Hall argues that a statement made by him to FBI Agents Murphy and Cotton during an interview at the Rikers Island Correctional Facility, after receiving *Miranda* warnings, was not properly admitted into evidence. There is no merit to his argument that the statement was obtained in violation of his Fifth and Sixth Amendment rights.**

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* Even assuming *arguendo*, contrary to the facts proved at the pre-trial suppression hearing, that Hall had not been warned that anything he said could be used against him, the statement under the circumstances would still have been admissible. *United States* v. *Vigo*, *supra*, 487 F.2d at 298-99; *cf. United States* v. *Diggs*, 497 F.2d 391, 393 nn. 2 & 3 (2d Cir. 1974).

** We do not understand Hall to challenge the voluntariness of either the April 13, 1973 or the May 31, 1973 statements. In any event, the District Court found both statements to have been

[Footnote continued on following page]

On May 31, 1973, Hall was incarcerated at Rikers Island on a state charge of attempted murder, which had nothing to do with the bank guard's gun (H. 166). (This was one of the several state charges pending against Hall at the time). Hall consented to be interviewed by the two FBI Agents (H. 112; Opinion, p. 11). The FBI Agents began the interview by advising Hall of his *Miranda* rights (Opinion 11-12; H. 106-109). The FBI Agents also advised Hall that they were investigating the bank robbery at the Security National Bank on January 25, 1973 and that they had fingerprint evidence and eyewitness testimony linking Hall to the crime (H. 152-53), and advised him of the penalties for bank robbery with use of a gun (H. 154-54). Hall then made a statement detailing his participation in and the circumstances surrounding the bank robbery. FBI Agent Murphy showed Hall his notes of the interview. Hall said that the statement was true and correct, but refused to sign the statement (H. 109-110).

In the District Court, Hall argued that because the FBI agents were aware that Hall had state charges pending against him on May 31, 1973, they were obliged under *Massiah* v. *United States*, 377 U.S. 201 (1964), to seek out his state-appointed attorney prior to questioning (Opinion, p. 12). He also pointed out that the complaint charging Hall with the bank robbery had been filed with the United States Magistrate on May 1, 1973, and that subsequently, a detainer was lodged at the Riker's Island detention facility.

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voluntarily made, finding that Hall had "at least average intelligence"; that at the hearing "he understood the questions posed and was totally responsive and lucid"; and that the 1971 Matteawan State Hospital report indicated that defendant had in 1971 recovered from his one psychotic episode (Opinion, pp. 10-11). Moreover, the District Court instructed the jury that, in order to consider either statement, they had to find such statement voluntary "beyond a reasonable doubt". (Tr. 470-471). This was far more than defendant was entitled. See Title 18, United States Code, Section 3501.

The District Court rejected these arguments, holding that *Massiah* does *not*:

> "cover situations where the defendant has yet to be indicted on the federal charge. *United States* v. *Masullo,* [489 F.2d 217 (2d Cir. 1973)]; *United States* v. *Ramirez,* 482 F.2d 807, 815 (2d Cir. 1973) or even post-indictment situations where the defendant is not deceived nor coerced, but rather given complete *Miranda* warnings. *United States* v. *Barone,* 467 F.2d 247, 249 (2d Cir. 1972)." Opinion, p. 13

The Court found defendant's cases inapposite, as indeed they are (Opinion, pp. 13-14).

It is well established that absent the kind of deceptive practices found in *Massiah,* a defendant's admission, given after a waiver of counsel, are fully admissible despite the absence of counsel at such a stage. See *United States* v. *Diggs,* 497 F.2d 391 (2d Cir. 1974); *United States* v. *Barone,* 467 F.2d 247, 249 (2d Cir. 1972). See also *United States* v. *Messina,* Dkt. No. 74-2066 (2d Cir. December 10, 1974) slip op., pp. 663, 668-670. *Accord, e.g., United States* v. *Cobbs,* 481 F.2d 196, 199-200 (3rd Cir. 1973); *United States* v. *Springer,* 460 F.2d 1344 (7th Cir. 1972); *Coughan* v. *United States,* 391 F.2d 371 (9th Cir.), *cert. denied,* 393 U.S. 870 (1968).*

In *Masullo,* the defendant had been arrested outside the offices of his regular attorneys who had represented him in the past and in an ongoing New York criminal action (also involving narcotics for which he had been in

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* We do not understand any *McNabb-Mallory* contention to be involved on this appeal. Any such contention would, of course, be frivolous in view of Title 18, United States Code, Section 3501. *United States* v. *Collins,* 462 F.2d 792 (2d Cir. 1972).

Court that very day). Masullo was taken to the Bureau of Narcotics and Dangerous Drugs office where he made the incriminating statement on the offense for which he had been arrested after having been advised of his *Miranda* rights. In ruling the statement admissible, this Court held that the Sixth Amendment does not require the Government, when it is aware that the defendant is represented by counsel in a state case, to notify that attorney in the absence of proof that he has made an appearance on behalf of the defendant in the Federal proceeding.

In the present case, on May 31, 1973 Hall did not have counsel in the federal bank robbery case; in fact, he had been neither arrested nor ararigned nor indicted.* And on May 31, 1973, the FBI agents did not know the names of any of Mr. Hall's attorneys nor did he inform them of any such attorneys (H. 166).

At the time, Hall was incarcerated on an attempted murder charge having no relation whatever to the bank robbery charge. In these circumstances, the federal agents plainly had no responsibility—independent of identifying themselves as federal agents and advising defendant of all his rights, including his right to have counsel present at all times—to try to ascertain who represented the defendant on the various state charges pending against him and to advise all the lawyers of the proposed interview. Indeed, the few courts that have considered the question have uniformly held that no such burden is placed on the federal agents in those circumstances. See *United States* v. *Crook,* 503 F.2d 1378 (3d Cir. 1974); *United States* v. *Van Dusen,* 431 F.2d 1278, 1281 (1st Cir. 1970).

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* It is also appropriate to point out that the FBI Agents went to Riker's Island on May 31 to visit him in connection with the bank robbery charge. As the state court hearing transcript indicates, no attempt has been made to utilize the May 31, 1973 statement in connection with any state court charges.

As this Court made clear in *Masullo,* the duty to notify an attorney does not attach "unless and until the police or prosecutor learn that an attorney has been secured to assist the accused in *defending against the specific charges* for *which he is held*". *United States* v. *Masullo, supra,* 489 F.2d at 223, quoting *People* v. *Taylor,* 27 N.Y. 2d 327 (1971).

As *Masullo* recognized:

> "The concept that professional criminals have 'house counsel' because of prior escapades and that therefore Government agents knowing the identity of prior counsel have an obligation of constitutional or even ethical dimension to contact counsel before questioning them, is hardly appealing" *United States* v. *Masullo, supra,* 489 F.2d at 223.

POINT IV

The Trial Court properly permitted Flora O'Rourke's and Ouida Morrison's in-court identification of Hall as the bank robber.

After a preliminary hearing, two bank employee eyewitnesses—Flora O'Rourke and Ouida Morrison—were permitted to furnish in-court identification testimony identifying defendant as the bank robber.* There is no merit to Hall's argument that their testimony was inadmissible.

At the preliminary hearing, it was established that on January 25, 1973, the day of the bank robbery, the New York City police had shown the bank employees hundreds

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* The District Court also concluded that the bank guard, Charles Sullivan, would not be permitted to make an in-court identification because his recollection of the photograph spreads which he had been shown—and their method of presentation—was poor (Opinion, pp. 5-6).

of photographs (H. 30; Tr. 61; Opinion, p. 2). Six days later, on January 31, 1973, Mrs. O'Rourke and Mrs. Morrison were shown a booklet of approximately 25 to 30 photographs of black male robbery suspects (GX 8). Mrs. O'Rourke selected photograph 8C as depicting someone who looked "most like" the bank robber (Opinion, p. 2; H. 20). Mrs. Morrison selected the same photograph as depicting the bank robber (Opinion p. 3; Tr. 64).

GX 8C, the photograph selected by Mrs. O'Rourke and Mrs. Morrison on January 31, 1973, is a photograph of a black bank robbery suspect taken during a bank robbery which took place at a time when Hall was in Clinton Correctional Facility (Tr. 382-386; Tr. 405).

The booklet, GX 8, is a revolving booklet maintained by the Federal Bureau of Investigation. The District Court found that the booklet contained many, but not all, of the same photographs shown to the bank employees on January 31, 1973 (Opinion, p. 2; Tr. 145-148).

In April 1973, both Mrs. O'Rourke and Mrs. Morrison were shown a spread of seven photographs (GX 1-7) by the FBI Agents. Mrs. O'Rourke selected two photographs which depicted people she thought looked like the bank robber. (Opinion, p. 2). One of these two photographs, GX 6, was Hall's photograph. Mrs. Morrison selected Hall's photograph, GX 6, as depicting the bank robber (Opinion, p. 3; Tr. 65). The District Court found that at no time in presenting these photographs to Mrs. O'Rourke or Mrs. Morrison prior to their making identifications did the F.B.I. agents suggest that they were interested in an identification of any particular person.*

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* The District Court also found that the F.B.I. Agents may have indicated tacit pleasure at Mrs. Morrison's April, 1973 identification, but such indication clearly came after Mrs. Morrison made her identification (Opinion, p. 3 footnote; Tr. 67-68).

With respect to the bank robbery, Mrs. O'Rourke testified that at approximately 10:30 in the morning, the bank robber stood in front of her for about two to three minutes, facing her for a good part of the time at close range (H. 18). The bank was well lit (H. 18).

Mrs. O'Rourke had a conversation with bank robber, after which he handed her a brown paper bag and told her to fill it up. Mrs. O'Rourke pushed the alarm and the guard came over and the man took the gun from the bank guard. He stated that he wasn't fooling and told Mrs. O'Rourke to fill up the bag. The bank robber took the bank guard's gun and put it in his back (H. 18).

Mrs. Morrison, a bank teller, testified that she first observed the robber for about five minutes when he was walking back and forth outside of the bank. She also observed him for about seven minutes inside the bank during the robbery (Tr. 60-61).

The Trial Court, in permitting this testimony gave a complete instruction, and what the Government submits is a highly favorable instruction from defendant's viewpoint, on the dangers of eyewitness misidentification (Tr. 473-474).

The thrust of Hall's position appears to be that the identification testimony should have been suppressed by reason of the failure of the Government to adduce the hundreds of photos shown the bank employees by the New York City Police on January 25, 1973. Hall also objects to the failure to preserve the booklet intact.

Despite Hall's contention that the Government's failure constituted some sort of violation of its obligation under *Brady* v. *Maryland*, 373 U.S. 83 (1963), nothing could be

more inaccurate.* In the first place, this Court has upheld identification eyewitness testimony where it was impossible for the Government to recreate the photograph spread shown to the witnesses. *United States* v. *Mieles*, 481 F.2d 960, 962 (2d Cir. 1973). Here, of course, the Government was able to produce 10 to 20 of the photographs contained in the booklet shown on January 31, 1973 and the precise photograph spread shown in April 1973.

In any case, the test for the admissibility of Mrs. O'Rourke's and Mrs. Morrison's in-court identification testimony depends upon whether the photographs shown to the eyewitnesses were so "impermissibly suggestive as to give a very substantial likelihood of irreparable misidentification." *Simmons* v. *United States*, 390 U.S. 377, 384 (1968); *United States* v. *Evans*, 484 F.2d 1178 (2d Cir. 1973). The inquiry under *Simmons* is two-pronged: whether the initial identification procedure was impermissibly suggestive, and, if so, whether the procedure had such a tendency "to give rise to a very substantial likelihood of irrpearable misrepresentation that allowing the in-court identification would be a denial of due process of law"; resolution of the latter issue "depends on the totality of the circumstances." *United States ex rel. Phipps* v. *Follette*, 428 F.2d 912, 914-915 (2d Cir.), *cert. denied*, 400 U.S. 908 (1970). See also *Neil* v. *Biggers*, 409 U.S. 188, 200 (1972). The Government submits that the January 25 showing of hundreds of photographs by the New York Police, the booklet shown on January 31 and the photograph spread, GX 1-7, were entirely proper, as the District Court found. Indeed, it is noteworthy that Hall never challenged the photographs themselves. He urges

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* Nothing in *Brady* v. *Maryland* requires the Government to subpoena the New York Police officers who showed Mrs. O'Rourke and Mrs. Morrison the hundreds of the photographs on January 25, 1973, when it was equally within defendant's right of compulsory process to achieve the same objective if he deemed fit.

rather that the tacit pleasure shown by the F.B.I. agents *after* Mrs. Morrison selected Hall's photograph, somehow tainted her in-court identification.

The District Court, however, found to the contrary, and even assuming *arguendo* that manner in which the spread of seven photographs shown was suggestive, it is plain that it was not the source of Mrs. Morrison's in-court identification. *United States ex rel. Gonzalez* v. *Zelker*, 477 F.2d 797 (2d Cir. 1973); *United States ex rel. Frasier* v. *Henderson*, 464 F.2d 260, 264-265 (2d Cir. 1972); *United States ex rel. Beyer* v. *Mancusi*, 436 F.2d 755 (2d Cir.), *cert. denied*, 403 U.S. 933 (1971).

Mrs. Morrison saw Hall for a total of approximately twelve minutes. She observed Hall for five minutes when he was outside of the bank prior to the robbery and for seven minutes inside the well lit bank. In sum, her opportunity to observe Hall was far better than in many cases where highly suggestive procedures had been employed and where identifications had nonetheless been permitted and upheld. *Neil* v. *Biggers, supra; United States ex rel. Gonzalez* v. *Zelker*, 477 F.2d 797, 801 (2d Cir. 1973); *United States ex rel. Smiley* v. *LaVallee*, 473 F.2d 682 (2d Cir. 1973); *United States* v. *Counts*, 471 F.2d 422, 424-25 (2d Cir.), *cert. denied*, 411 U.S. 939 (1973); *United States ex rel. Robinson* v. *Zelker*, 468 F.2d 159, 163-165 (2d Cir. 1972), *cert. denied*, 411 U.S. 939 (1973); *United States ex rel. Bisordi* v. *LaVallee*, 461 F.2d 1020, 1024 (2d Cir. 1972).

United States v. *Fernandez*, 456 F.2d 638, 641-644 (2d Cir. 1972), cited by Hall, actually supports the Government's position since this Court there expressly permitted the four bank employees to make eye-witness identifications at the new trial, where they observed the robbery for a period of five to seven minutes. 456 F.2d at 642-643. In

accordance with the suggestion in *Fernandez,* the District Court here gave an instruction along the lines contemplated by Judge Friendly's opinion, 456 F.2d 643-644, even though *United States* v. *Evans,* 484 F.2d 1178 (2d Cir. 1973) can be read as not requiring this under the circumstances here involved.

In any event the extensive cross-examination by Hall's counsel covering virtually the entire panoply of issues on the identification issue, coupled with the District Court's instruction on the subject, *United States* v. *Fernandez, supra,* more than amply protected the defendant's rights.

POINT V

The Trial Court did not abuse its discretion in not ordering a psychiatric examination of Hall.

Where a motion is made before sentence for a psychiatric examination pursuant to 18 U.S.C. § 4244, a court is required to order such an examination unless it determines that the motion is frivolous or was not filed in good faith. *United States* v. *McEachern,* 465 F.2d 833, 838 (5th Cir.), *cert. denied,* 409 U.S. 1043 (1972); *United States* v. *Pogany,* 465 F.2d 72, 77 (3d Cir. 1972); *United States Urvin,* 450 F.2d 968 (9th Cir. 1971). However, in making this determination, the trial court is afforded a considerable degree of discretion. As the Court of Appeals stated in *United States* v. *McEachern, supra*:

> "Unquestionably there is an allowable range of discretion in the district judge in granting or denying a motion for a § 4244 examination . . . the trial judge's discretion operates at two levels; that of determining whether there is an undergirding factual basis for 'reasonable cause to believe,' and whether the facts which the court accepts as existent are

> wholly insufficient to give rise to the alleged 'reasonable cause to believe.' Interwoven through both levels is the principle, as usually articulated, that the court may reject a motion which it considers to be frivolous or filed not in good faith."

Applying these standards to the instant case, it is clear that the trial court did not abuse its discretion in not ordering a psychiatric examination, since the facts presented were wholly insufficient to establish a "reasonable cause to believe" that appellant lacked the necessary competence to stand trial.

Appellant contends that his counsel's oral statements (Tr. 170-181) amounted to a motion for a psychiatric examination on the third day of trial which should have been granted because of the following circumstances: (1) appellant had been confined from December 10, 1971 through February 8, 1972 in the Matteawan State Hospital and the Clinical Summary report found that he had suffered a psychotic episode from which he had recovered; (2) apparently due to an altercation, appellant was transferred from the Tombs to the Riker's Island Hospital prior to the first day of trial; and (3) on the third day of trial, appellant appeared in court disheveled, and in handcuffs and legirons and, according to his counsel's statement on the record, refused to communicate any longer with counsel. None of these factors, either singly or taken together, raises even a reasonable doubt as to Hall's competency to stand trial at that time. *See Pate* v. *Robinson*, 383 U.S. 375, 385, 387 (1967); *United States ex rel. Roth* v. *Zelker*, 455 F.2d 1105, 1108 (2d Cir. 1971), *cert. denied*, 408 U.S. 927 (1972).

In the first place, appellant's reliance on the Matteawan Clinical Summary report is improper, for that document was never received in evidence on the issue of his competence to stand trial. As Hall admits on appeal (Br. 49) the report was offered at the pre-trial hearing only on the issue of appellant's capacity to voluntarily waive his rights at the time of his Riker's Island statement. Although appellant did introduce the Matteawan Clinical Summary re-

port into evidence at trial, he specified that it was not being offered as to his competence to stand trial. (Tr. 393).

Furthermore, Hall's attorney wrote a letter to the District Court, dated February 1, 1974, in which he unequivocally declared that *"I absolutely do not intend to raise any claim that Mr. Hall is not competent to stand trial."* (Emphasis supplied). At the time, Hall's counsel was aware of defendant's background, including the contents of the Matteawan Clinical Summary report, which concluded by noting that Hall's condition on discharge was that he had "recovered from psychotic episode." *

According to Hall's counsel, on the first day of trial, Hall had been transferred from the Tombs to the Riker's Island Hospital several nights before, apparently due to an altercation. However, no question of his competence was raised at that time. On the third day of trial, according to counsel, Hall persisted in refusing to communicate with his attorney. These facts are hardly sufficient to require the Court to order a psychiatric examination. In the first place, there is no evidence in the record to indicate that Hall was being held in a psychiatric ward at Riker's Island.** Second, the Court had before it a letter from a "referring physician" at the Riker's Island Hospital, Dr. Spaulding, which stated:

> "MS on admission—alert, oriented, articulate. Calm, coherent, no thought disorder. No change in his condition today. No psychosis. Defiant inmate. Okay to go to court today psychiatrically" (Tr. 172).

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* Indeed, Hall's counsel stated that Hall had been perfectly competent to assist and participate in the pretrial hearings and to prepare for trial (Tr. 175).

** On the third day of trial when appellant's attorney first argued that appellant's transfer to a psychiatric ward raised an issue as to his competence, the trial judge noted, quite correctly: "I don't know from this [Dr. Spaulding's letter] he is held in the psychiatric ward." Appellant's attorney replied: "That is my understanding either from the Marshals or our inquiry yesto establish appellant's commitment to a psychiatric ward at Riker's Island.

Appellant argues that this letter is not the equivalent of the findings of a court-appointed psychiatrist because there is no indication in the record that its author is a qualified psychiatrist and that he applied the proper standards. Taken together with the other facts as to Hall's mental state, including the District Court's findings on the voluntariness issue (see footnote, pp. 11-12, *supra*), and the legal positions he had previously taken, Dr. Spauling's letter furnished the Court with sufficient evidence to conclude that Hall's claims with respect to a psychiatric examination on the issue of competency were frivolous.*

POINT VI

The Trial Court did not abuse its discretion in admitting into evidence the paper bag containing appellant's fingerprints, since the Government introduced sufficient evidence to establish the necessary connection with the bank robbery.

According to the testimony of Mrs. O'Rourke, the robber placed the money given to him in a brown paper bag. (Tr. 102) Mrs. Rourke and the bank guard, Mr. Sullivan, testified that a short time after the robber had left the bank, some workmen came running into the bank carrying a brown paper bag containing some of the hold-up money,

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* Additionally, the District Court in ordering a 90-day study pursuant to Title 18, United States Code, Section 4208(b), had before it on the day of sentence a report which included data regarding Hall's "mental and physical health." Title 18, United States Code, Section 4208(c). Under the circumstances, the Court's imposition of a fifteen year sentence, after having received the report, would seem to indicate that the report did not (i) differ from the views of Dr. Spaulding or (ii) contain any suggestion that Hall had not been fit to stand trial, or was unable to be sentenced.

including $480 of the bait money, which was placed on Mrs. O'Rourke's counter and left there. (Tr. 104-09, 136). F.B.I. Agent Ahlerich testified that after arriving at the bank he seized a brown paper bag which was wadded and torn and which was lying on a teller's counter next to a large amount of money and some straps for the money. (Tr. 209 215). The bag seized by Agent Ahlerich contained Hall's fingerprints.

Hall argues that the trial court erred in admitting that bag in evidence because there was insufficient proof of its connection to the offense. In support of that argument, appellant relies on the generally recognized rule that "tangible objects become admissible in evidence only when proof of their original acquisition and subsequent custody forges their connection with the accused and the criminal offense." *Gass* v. *United States,* 416 F.2d 767, 770 (D.C. Cir. 1969). However the Court in *Gass* went on to say that this rule "demands that the possibilities of misidentification and adulteration be eliminated, not absolutely, but as a matter of reasonable probability." *Id.* This Court adopted that test in *United States* v. *Lavin,* 480 F.2d 657, 662 (2d Cir. 1973) and added: "In the final analysis, the determination of whether that reliability exists [as to a continuous chain of custody] must be left to the sound discretion of the trial judge."

There is an absolutely clear connection between the paper bag admitted in evidence and Hall since it contained his fingerprints. Furthermore, there is a crystal clear connection between the paper bag used in the robbery and the bag brought in by the workmen and, indeed Hall concedes that the jury could properly infer that they were one and the same. He argues, however, that the chain of custody from the time the paper bag was placed on Mrs. O'Rourke's counter until it was retreived by F.B.I. Agent Ahlerich was not adequately proved. This contention is frivolous.

Hall's contention that the paper bag brought in by the workmen, unlike the torn paper bag taken by Ahlerich, was not torn is simply incorrect. On May 31, 1973 Hall admitted that while fleeing from the bank, the brown paper bag in which he carried the money and the two guns ripped and fell to the ground. He further admitted that someone began helping him pick up the money until he noticed the two guns. Moreover, both Mrs. O'Rourke and Ahlerich testified that the money rested near the bag on the teller's counter.

In sum, the common factors supporting the chain of custody here are overwhelming. The brown paper bag containing some of the hold-up money, including $480 of the bait money which Mrs. O'Rourke placed in the bag, was returned by the workmen and placed on Mrs. O'Rourke's counter. A short time later Agent Ahlerich seized a brown paper bag lying next to a large sum of money and money straps on a teller's counter. These facts clearly suffice to eliminate the possibility of misidentification "as a matter of reasonable probability."

POINT VII

Hall's charges of prosecutorial misconduct are without merit.

Hall contends (Br. at 54-56) that he was denied a fair trial because of prosecutorial misconduct. The argument is wholly without merit.

The first claim of error relates to the prosecutor's comment before the Government's rebuttal case and summation:

> "I believe my last witness is enroute and hope he will arrive momentarily, but I expected Mr. Berman to put on more witnesses (Tr. 406).*

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* The prosecutor's understanding of the situation was prompted by Mr. Berman's comments at pp. 304 and 379 of the Trial Transcript.

Appellant does not explain how this remark produced any prejudice nor is any discernible. *Cf. United States* v. *Lipton,* 467 F.2d 1161, 1168-1169 (2d Cir. 1972).

Hall also erroneously argues that the prosecutor improperly referred to the fact that the bank guard's gun was found on Hall, "when he was arrested by the New York City Police for menacing with a loaded gun" (Tr. 449).

Despite Hall's claims to the contrary, these facts were put into evidence on *three* separate occasions without duced a report (GX 3510-C) in evidence (Tr. 285-287), states that the charges on which Hall had been arrested on April 13, 1973, included possession of a dangerous weapon and menacing, and that Hall had threatened the complainant with a loaded gun.

In addition, the Government introduced Hall's statement to the F.B.I. Agents (GX 20) which contained the statement:

> "On April 13, 1973 I was arrested by the New York City Police for possessing a loaded gun."

No objection to the statement on this score had ever been made. Finally, F.B.I. Agent Murphy, testified that Hall and not the agents was the source of this statement (Tr. 375).

Moreover, the Matteawan Report, introduced by Hall at trial and set forth in his appendix, refers to his "long history of crimes of assualt," and the fact that he had been sentenced to four years imprisonment for attempted robbery in 1968. (Matteawan Report p. 1.) In addition, Hall introduced the letter from the Warden of the Clinton Correctional Facility pointing out his incarceration in 1972 in that State prison.

In sum, the thrust of Hall's contention—that he was prejudiced by the prosecutor's reference to Hall's April 13, 1973 state arrest—is utter nonsense, since Hall himself had introduced a plethora of evidence that made readily apparent to the jury that Hall had a long criminal history and that he had been arrested on April 13, 1973 for menacing with a loaded gun.*

Finally, Hall claims that FBI Agent Murphy irreparably prejudiced his case by referring to the location of the May 31 statement as being "Riker's Island", rather than "jail." The significance of the supposed prejudice is that the jury was not to know that Hall at that was incarcerated on state charges.

In the first place, Federal prisoners are on occasion lodged at Riker's Island. Second, Hall's counsel referred to Hall's incarceration at Riker's Island in summation, thereby indicating that he could not have thought it to be a detrimental remark (Tr. 433). Third, as previously noted, by the time the jury got the case, there had been a large number of references to Hall's incarcerations on state charges, including those mentioned during Mr. Berman's summation (Tr. 427).

In sum, the so-called "indiscretions" that Hall relies upon are without any substance. To cite such cases as *United States* v. *Drummond,* 481 F.2d 62 (2d Cir. 1973) and the other cases relied on by Hall (Br. at 55-56) is to go exceedingly wide of the mark.**

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* For Hall to refer to a ground rule (Br. at 55) agreed upon at the commencement of trial (Tr. 11), without making any reference whatever to his own introduction of an abundance of evidence as to his criminal record, is deceptive and misleading.

** Hall's other allegations of misconduct (Br. at 30 n.) are equally frivolous. For example, the Government's opening (Tr. 79-80) was quite obviously a proper preview of the evidence and

[Footnote continued on following page]

POINT VIII

The Trial Court properly denied Hall's motion for a mistrial when at lunch during deliberations, several jurors heard a man say "Show no mercy."

On the afternoon of the first day of deliberations, the Deputy Marshal reported to the Court that several jurors had mentioned to him that as they were leaving the restaurant after lunch, someone yelled at them, "Show no mercy" (Tr. 494). On the basis of this incident, appellant moved for a mistrial, and that motion was denied (Tr. 495). Thereafter, appellant took the position that nothing should be done to call the jruors' attention to the incident and therefore opposed the Court's questioning or instructing the jury concerning the incident (Tr. 499, 501-02). The Court, however, examined the jury as follows:

"The Court: Mrs. Martello, ladies and gentlemen, I am sorry for this interruption but something came to my attention. After thinking about it, I thought perhaps I better just make sure that it is cleared up.

I understand from the marshal who was with you at lunch that one or perhaps more than one of you mentioned to him that during lunch you had heard a bystander make some kind of a comment.

I just want to be perfectly clear that, assuming this happened, that none of you have any doubts about your

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the Government established on the undisputed evidence at trial that the bank robber pointed a gun at Mrs. O'Rourke, the teller, and took away the bank guard's gun. Hall's claim about the Government's attempt to offer a hearsay document into evidence after he had only a short time previously done the same thing is ludicrous, particularly since the Court did not allow the Government's offer. In another instance Hall refers to, the Government, after the matter had been gone into on cross-examination, asked a question to refresh a witness's recollection, to which an objection was sustained (Tr. 129).

ability to continue to act without any bias to act impartially and fairly.

Does anybody have any doubts as a result of what happened at lunch, I don't know, really, what happened.

Juror No. 8: I didn't hear it.

The Court: I want to be clear about this. Does anybody have any doubts?

I thought I just better make sure that anybody who wanted to unburden their soul could tell me.

Thank you very much. Sorry to bother you" (Tr. 502-03).

The rule is well-established that jurors should not receive communications from outsiders concerning the case before them. *Mattox* v. *United States*, 146 U.S. 140 (1892). "But like other rules for the conduct of trials, it is not an end in itself; and while lapses should be closely scrutinized, when it appears with certainty that no harm has been done, it would be the merest pedantry to insist upon procedural regularity." *United States* v. *Compagna*, 146 F.2d 524, 528 (2d Cir. 1944) (L. Hand, *J.*), *cert. denied*, 324 U.S. 867 (1945). Thus, this Court has held that the Trial Court did not err in denying a motion for a mistrial where as the jurors were leaving the courthouse one evening during their deliberations, a day and a half before returning their verdict, the jurors were surrounded by photographers, television cameramen, and reporters who took their pictures and asked them questions. *United States* v. *Kahaner*, 317 F.2d 459, 482-83 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963); see *United States* v. *Sperling*, 362 F. Supp. 909, 913 (S.D.N.Y. 1973), *aff'd*, Dkt. Nos. 73-2363, etc. (2d Cir. October 10, 1974) slip op. p. 5637, 5670 n. 30.

Unlike the cases relied upon by appellant, this case does not present a situation in which there was conversation between jurors and a prosecuting attorney, or a witness,

or anyone else connected with the trial. Rather, the incident here, as was true in *Kahaner,* involved a fleeting remark by a perfect stranger, and in this case there is not even an indication that the stranger had any interest in or knowledge of the case. Certainly, the period of contact here was far more brief than in *Kahaner.* Furthermore, the trial judge took the precaution of questioning the jurors to determine if the remark had affected their ability to act impartially. Since none of them indicated that the remark had, the Court properly concluded that there had been no prejudice.

Appellant attacks this procedure on two rather contradictory grounds. On the one hand, he contends that the Trial Court failed to make a finding of no prejudice with sufficient particularity for meaningful appellate review; on the other hand, he complains that by questioning the jurors about the incident, the Trial Court reinforced its impact.

There is no way for a Court to assess the possible prejudicial effect of a communication outside the jury room without asking the jurors about it. The Trial Court did so in this case in a way designed to give the least amount of emphasis to the incident—the remark was not repeated—particularly because the marshali could not determine exactly which jurors had heard the remark. (Tr. 498-99). As a result of that examination, it is now obvious that there had been no prejudice when the Court sent the jury back to continue its deliberations. In view of appellant's opposition to *any* questioning of the jury, he is in no position now to argue that the record is not adequate for meaningful appellate review on the question of prejudice. In any event, the lack of prejudice is apparent from the record, for not a single juror expressed the least doubt as to his ability to continue to act impartially, and thus the Trial Court did not err in denying appellant's motion for a mistrial.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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SAS:am

Form 279 - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

STEVEN A. SCHATTEN, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 30th day of December, 1974 he served two copies ~~a copy~~ of the within Government's Brief by placing the same in a properly postpaid franked envelope addressed:

Jesse Berman, Esq.
351 Broadway
New York, New York 10013

And deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Steven A. Schatten

STEVEN A. SCHATTEN
Assistant United States Attorney

Sworn to before me this

30th day of December, 1974.

Jeanette Ann Grayeb

Notary Public
JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975